Public Prosecutor v Muhammad Khairuanuar bin Baharuddin and another appeal

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05(L)-15–01 OF 2023(W) AND 05(L)-75–05 OF 2024(W)
HARMINDAR SINGH, NORDIN HASSAN AND HANIPAH FARIKULLAH FCJJ
29 OCTOBER 2024

Criminal Law — Murder — Whether ingredients of charge proven — Court of Appeal ('COA') substituted accused's murder conviction with culpable homicide not amounting to murder conviction — Whether COA's substitution on ground prosecution had not proven pre-meditation or pre-existing malice on accused's part was flawed — Whether aforesaid elements were not required to be proven to establish murder charge under s 302 of Penal Code — Whether none of the Exceptions to s 300(c) of Penal Code applied to absolve accused of murder charge — Whether totality of evidence and facts showed accused intended to inflict fatal injuries on deceased — Whether accused's alibi defence was untenable — Whether exceptionality of deceased's murder dissuaded court from exercising discretion under Abolition of Mandatory Death Penalty Act 2023 to commute accused's death sentence to jail term

The respondent ('accused') in the prosecution's appeal herein was sentenced to death by the High Court after being found guilty of murdering his 26-month old step-daughter ('the deceased') at his house ('the house'). On finding that the murder charge had not been made out, the Court of Appeal ('COA') reversed the verdict, convicted the accused on a lesser charge of culpable homicide not amounting to murder under s 304(b) of the Penal Code and sentenced him to ten years' jail. In the instant appeals, the prosecution appealed against the reduced conviction and sentence whilst the accused appealed against the COA's refusal to grant him an acquittal and discharge. The trial court had heard that the deceased's mother, PW7, married the accused after her divorce from the deceased's natural father. Thereafter, PW7 lived with her father and not with the accused because he was then living in the house with his first wife. At first, PW7 left the deceased and the deceased's sister with a babysitter when she went to work, but on the accused's insistence, she left the deceased at his house instead. Even at that time, the deceased had complained that the accused had often hurt her physically. The accused's driver, PW8, told the trial court that about 3pm on the day the deceased died, he was asleep on a sofa in the downstairs living room of the house when the deceased's screams woke him up. At the time, the deceased was with the accused in the master bedroom upstairs. PW8 said the deceased was still alive when he went to talk to the accused about a water leakage problem in the house. However, a few hours later, while PW8

was in the kitchen, the accused urgently called for PW8 to come upstairs. On entering the master bedroom, PW8 said he saw the deceased lying on the floor and her face and lips were bluish. The accused was standing near the deceased. Both of them took the deceased to a clinic, but the accused carried the deceased into the clinic through its back door. The doctor at the clinic ('PW3') found that the deceased was already dead and, noticing the bruises on her body, told the accused to take her to a hospital for further action. The accused told PW3 that he was a policeman and asked PW3 to issue a death certificate but PW3 refused to do so. The accused then took the deceased to the forensics department of the Kuala Lumpur Hospital where a post mortem revealed that she had died of severe head injuries due to blunt force trauma. There were also 29 external injuries on her body. During the trial, DW7 testified that the accused had not only requested a doctor at the hospital to confine the post mortem examination only to the chest area of the deceased's body but, after reading the post mortem report, he had also asked her to get a doctor friend to change the result stated in the said report. At the trial, the accused had, amongst other things, relied on the defence of alibi, contending that he was not in the house at the time of the deceased's death. The COA found the murder charge unproven because there was no evidence of pre-meditation or pre-existing malice on the accused's part towards the deceased, as well as no evidence to show the accused had intended to inflict the injuries on the deceased and knew that the injuries were so imminently dangerous that it would have caused her death.

Held, allowing the prosecution's appeal, dismissing the accused's appeal, setting aside the COA's decision and restoring and affirming the High Court's decision:

(1) Intention was a question of fact that could not be proven by direct evidence. Inference from the evidence presented and the surrounding circumstances had to be made to determine this fact (see para 32).

(2) The accused had the opportunity to inflict the injuries on the deceased. He was the last person seen with the deceased while she was alive. Importantly, the accused's conduct after the deceased's death showed the act of covering up the offence committed — he took the deceased into PW3's clinic through the back door, requested PW3 to issue a death certificate, introduced himself as a policeman, requested the post mortem to be carried out only on the chest of the deceased's body and asked PW7 to get a doctor friend to change the post mortem result. The 29 injuries, particularly on the deceased's head and which were not accidental, spoke volumes that the accused intended to inflict the injuries on the deceased, as did the evidence that the deceased had informed PW1 and PW2 that the accused had caused the bruises on her legs and thighs. Having had the audio-video advantage at the trial, the trial court found as a fact that the accused intentionally inflicted the fatal

injuries on the deceased. The appellate court should be slow to disturb such a finding of fact (see paras 35–36).

(3) The medical evidence in this case led the trial court, as well as this court, to find that the injuries to the deceased's head were of a kind that was sufficient in the ordinary course of nature to cause death. The total effect of the pathologist's (PW12's) evidence led to that conclusion. In the result, the elements in s 300(c) of the Penal Code ('the PC') had been established by the prosecution for the offence of murder against the accused (see paras 42–43).

(4) The COA's reason for substituting the murder conviction with a conviction of culpable homicide not amounting to murder was flawed for the simple reason that whether the accused had pre-meditation or pre-existing malice towards the deceased were not elements of an offence of murder under s 302 of the Penal Code and the prosecution's failure to establish those two elements could not justify the substitution of the murder conviction for a conviction on a lesser offence (see para 45).

(5) To establish the offence of murder, the prosecution had to prove the death of the deceased and that it was caused by the injuries suffered; that the injuries were caused by the accused and that the accused's act came within one or a combination of the limbs under s 300 of the PC. In the present case, the applicable limb was s 300(c) of the PC. The phrase 'without pre-meditation' only occurred in Exception 2 and Exception 4 to s 300 of the PC and in both cases the absence of pre-meditation made the culpable homicide not murder. But Exception 2 only applied when the accused exercised his right of private defence whilst Exception 4 only applied in a 'sudden fight' situation. Exceptions 2 and 4, therefore, did not apply to the factual matrix of the present case. In fact, the accused did not rely on any of the Exceptions to s 300 of the PC. Hence, there was no justification for the COA to reduce the accused's murder charge (see paras 46–49).

(6) Given the date, time and place stated in the murder charge, the facts stated in the accused's notice of alibi failed to show that he was somewhere else at the material time. The accused had the opportunity to commit the murder. His presence at the place and time of commission of the offence was positively identified by PW8 who was found by both the courts below to be a credible witness. Further, the trial judge found material contradictions between the facts stated in the notice of alibi and the accused's testimony in court, particularly regarding the time of certain events. The accused had failed to show affirmative proof that he was somewhere else when the offence was committed and his alibi defence was rightly rejected by the trial judge (see paras 53 & 55–56).

(7) The accused's death sentence was maintained. The murder of the deceased was an exceptional case that refrained this court from exercising its discretion to order a jail sentence under the Abolition of Mandatory Death Penalty Act 2023 (see para 58).

[Bahasa Malaysia summary

Responden ('tertuduh') dalam rayuan pendakwaan di sini telah dijatuhkan hukuman mati oleh Mahkamah Tinggi selepas didapati bersalah membunuh anak perempuan tirinya yang berusia 26 bulan ('si mati') di rumahnya ('rumah tersebut'). Dalam mendapati bahawa pertuduhan membunuh tidak dibuktikan, Mahkamah Rayuan ('MR') mengubah keputusan itu, mensabitkan tertuduh atas pertuduhan yang lebih ringan iaitu mematikan orang dengan salah yang tidak terjumlah kepada kesalahan membunuh orang di bawah s 304(b) Kanun Keseksaan dan menjatuhkan hukuman penjara sepuluh tahun. Dalam rayuan semasa, pihak pendakwaan merayu terhadap pengurangan sabitan dan hukuman manakala tertuduh merayu terhadap keengganan MR untuk memberikannya pelepasan dan pembebasan. Mahkamah perbicaraan telah mendengar bahawa ibu si mati, PW7, berkahwin dengan tertuduh selepas dia bercerai dengan bapa kandung si mati. Selepas itu, PW7 tinggal bersama bapanya dan tidak bersama tertuduh kerana ketika itu dia tinggal di rumah itu bersama isteri pertamanya. Pada mulanya, PW7 meninggalkan si mati dan kakak si mati dengan pengasuh ketika dia pergi bekerja, tetapi atas desakan tertuduh, dia meninggalkan si mati di rumahnya. Malah pada ketika itu, si mati pernah mengadu bahawa tertuduh sering mencederakannya secara fizikal. Pemandu tertuduh, PW8, memberitahu mahkamah perbicaraan bahawa kira-kira jam 3 petang pada hari si mati meninggal dunia, dia sedang tidur di atas sofa di ruang tamu tingkat bawah rumah itu apabila jeritan si mati menyedarkannya. Ketika itu, si mati berada bersama tertuduh di bilik tidur utama di tingkat atas. PW8 berkata, si mati masih hidup ketika dia pergi berbincang dengan tertuduh mengenai masalah kebocoran air di rumah berkenaan. Bagaimanapun, beberapa jam kemudian, ketika PW8 berada di dapur, tertuduh segera meminta PW8 naik ke tingkat atas. Ketika memasuki bilik tidur utama, PW8 berkata dia melihat si mati terbaring di atas lantai dan muka serta bibirnya kebiruan. Tertuduh berdiri berhampiran si mati. Kedua-dua mereka membawa si mati ke sebuah klinik, namun tertuduh membawa si mati masuk ke dalam klinik melalui pintu belakangnya. Doktor di klinik berkenaan ('PW3') mendapati si mati sudah pun meninggal dunia dan menyedari kesan lebam di badan, memberitahu tertuduh membawanya ke hospital untuk tindakan lanjut. Tertuduh memberitahu PW3 bahawa dia seorang anggota polis dan meminta PW3 mengeluarkan sijil kematian tetapi PW3 enggan berbuat demikian. Tertuduh kemudian membawa si mati ke bahagian forensik Hospital Kuala Lumpur di mana bedah siasat mendapati dia meninggal dunia akibat kecederaan parah di kepala akibat hentakan objek tumpul. Terdapat juga 29 kecederaan luaran pada badannya. Semasa perbicaraan, DW7 memberi keterangan bahawa tertuduh

bukan sahaja meminta doktor di hospital untuk menghadkan pemeriksaan bedah siasat hanya di bahagian dada mayat si mati tetapi, selepas membaca laporan bedah siasat, dia juga memintanya mendapatkan rakan doktor untuk menukar keputusan yang dinyatakan dalam laporan tersebut. Pada perbicaraan, tertuduh telah, antara lain, bergantung pada pembelaan alibi, dengan alasan bahawa dia tidak berada di dalam rumah pada masa kematian si mati. MR mendapati pertuduhan membunuh tidak terbukti kerana tiada keterangan pra-meditasi atau niat jahat yang sedia ada di pihak tertuduh terhadap si mati, serta tiada keterangan yang menunjukkan tertuduh berniat untuk mendatangkan kecederaan kepada si mati dan mengetahui bahawa kecederaan itu sangat berbahaya sehingga menyebabkan kematiannya.

Diputuskan, membenarkan rayuan pihak pendakwaan, menolak rayuan tertuduh, mengenepikan keputusan MR dan memulihkan serta mengesahkan keputusan Mahkamah Tinggi:

(1) Niat adalah persoalan fakta yang tidak dapat dibuktikan dengan keterangan langsung. Inferens daripada keterangan yang dikemukakan dan keadaan sekeliling perlu dibuat untuk menentukan fakta ini (lihat perenggan 32).

(2) Tertuduh berpeluang mendatangkan kecederaan kepada si mati. Dia adalah orang terakhir yang dilihat bersama si mati semasa dia masih hidup. Yang penting, perlakuan tertuduh selepas kematian si mati menunjukkan tindakan menutup kesalahan yang dilakukan — dia membawa si mati masuk ke klinik PW3 melalui pintu belakang, meminta PW3 mengeluarkan sijil kematian, memperkenalkan diri sebagai anggota polis, minta bedah siasat untuk dijalankan hanya di dada si mati dan meminta PW7 mendapatkan rakan doktor untuk menukar keputusan bedah siasat. 29 kecederaan, terutamanya di kepala si mati dan yang bukanlah tidak disengajakan, menyatakan bahawa tertuduh berniat untuk mendatangkan kecederaan ke atas si mati, begitu juga keterangan bahawa si mati telah memaklumkan PW1 dan PW2 bahawa tertuduh telah menyebabkan lebam pada kaki dan pehanya. Setelah mempunyai kelebihan audio-video pada perbicaraan, mahkamah perbicaraan mendapati fakta bahawa tertuduh dengan sengaja menyebabkan kecederaan maut ke atas si mati. Mahkamah Rayuan harus lambat mengganggu dapatan fakta tersebut (lihat perenggan 35–36).

(3) Keterangan perubatan dalam kes ini menyebabkan mahkamah perbicaraan, dan juga mahkamah ini, mendapati bahawa kecederaan pada kepala si mati adalah sejenis yang cukup dalam keadaan biasa untuk menyebabkan kematian. Jumlah kesan keterangan ahli patologi (PW12) membawa kepada kesimpulan itu. Hasilnya, unsur-unsur

dalam s 300(c) Kanun Keseksaan ('KK') telah dibuktikan oleh pihak pendakwaan bagi kesalahan membunuh terhadap tertuduh (lihat perenggan 42–43).

(4) Alasan MR untuk menggantikan sabitan pembunuhan dengan sabitan mematikan orang dengan salah yang tidak terjumlah kepada kesalahan membunuh orang adalah cacat atas alasan mudah bahawa sama ada tertuduh mempunyai niat pra-meditasi atau niat jahat yang sedia ada terhadap si mati bukanlah unsur-unsur kesalahan pembunuhan di bawah s 302 Kanun Keseksaan dan kegagalan pihak pendakwaan untuk membuktikan kedua-dua elemen itu tidak boleh mewajarkan penggantian sabitan membunuh dengan sabitan atas kesalahan yang lebih ringan (lihat perenggan 45).

(5) Untuk membuktikan kesalahan membunuh, pihak pendakwaan perlu membuktikan kematian si mati dan ia disebabkan oleh kecederaan yang dialami; bahawa kecederaan adalah disebabkan oleh tertuduh dan bahawa perbuatan tertuduh datang dalam satu atau gabungan bahagian di bawah s 300 KK. Dalam kes semasa, bahagian yang berkenaan adalah s 300(c) KK. Frasa 'tanpa pra-meditasi' hanya berlaku dalam Pengecualian 2 dan Pengecualian 4 kepada s 300 KK dan dalam kedua-dua kes ketiadaan pra-meditasi menjadikan mematikan orang dengan salah bukan pembunuhan. Tetapi Pengecualian 2 hanya terpakai apabila tertuduh menggunakan hak pembelaan peribadinya manakala Pengecualian 4 hanya digunakan dalam situasi 'pergaduhan mengejut'. Pengecualian 2 dan 4, oleh itu, tidak terpakai pada matriks fakta kes ini. Malah, tertuduh tidak bergantung pada mana-mana Pengecualian kepada s 300 KK. Oleh itu, tiada justifikasi untuk MR mengurangkan pertuduhan membunuh tertuduh (lihat perenggan 46–49).

(6) Memandangkan tarikh, masa dan tempat yang dinyatakan dalam pertuduhan membunuh, fakta yang dinyatakan dalam notis alibi tertuduh gagal menunjukkan bahawa dia berada di tempat lain pada masa yang material. Tertuduh mempunyai peluang untuk melakukan pembunuhan itu. Kehadirannya di tempat dan masa melakukan kesalahan itu dikenal pasti secara positif oleh PW8 yang didapati oleh kedua-dua mahkamah di bawah sebagai saksi yang boleh dipercayai. Selanjutnya, hakim perbicaraan mendapati percanggahan material antara fakta yang dinyatakan dalam notis alibi dan keterangan tertuduh di mahkamah, khususnya mengenai masa kejadian tertentu. Tertuduh telah gagal untuk menunjukkan bukti afirmatif bahawa dia berada di tempat lain semasa kesalahan itu dilakukan dan pembelaan alibinya telah ditolak oleh hakim perbicaraan (lihat perenggan 53 & 55–56).

(7) Hukuman mati tertuduh dikekalkan. Pembunuhan si mati adalah kes luar biasa yang menghalang mahkamah ini daripada menggunakan budi

A bicaranya untuk memerintahkan hukuman penjara di bawah Akta Pemansuhan Hukuman Mati Mandatori 2023 (lihat perenggan 58).]

Cases referred to

Chan Pean Leong v PP [1956] MLJ 237 (refd)
B *Duis Akim & Ors v PP* [2014] 1 MLJ 49; [2013] 9 CLJ 692, FC (refd)
Illian & Anor v PP [1988] 1 MLJ 421, SC (refd)
Ku Lip See v PP [1982] 1 MLJ 194, FC (refd)
Lee Ah Seng & Anor v PP [2007] 6 MLJ 1; [2007] 5 CLJ 1, FC (refd)
Mickelson Gerald Wayne v PP [2022] 6 MLJ 118, FC (refd)
C *Mohamed Yasin bin Hussin v PP* [1976] 1 MLJ 156, PC (refd)
PP v Sanderasegaran a/l Nithenanham [2024] 3 MLJ 629; [2024] 4 CLJ 823, FC (refd)
PP v Visuvananthan [1978] 1 MLJ 159 (refd)
Tan Cheow Bock v PP [1991] 3 MLJ 404, CA (refd)
D *Tan Kim Ho & Anor v PP* [2009] 3 MLJ 151; [2009] 3 CLJ 236, FC (refd)
Virsa Singh v State of Punjab (1958) 1 MLJ (Crl) 579, HC (refd)
Zulkiple bin Mohamad v PP [2022] 1 MLJ 479; [2022] 1 CLJ 673, FC (refd)

Legislation referred to

E Abolition of Mandatory Death Penalty Act 2023
Criminal Procedure Code s 402A
Penal Code ss 300, 300(c), (d), 302, 304, 304(b)

Iznina Hanim bt Hashim (Deputy Public Prosecutor, Attorney General's
F *Chambers) for the appellant.*
Fahri Azzat (Fahri, Azzat & Co) for the respondent.

Nordin Hassan FCJ:

G INTRODUCTION

[1] This case concerns a murder charge under s 302 of the Penal Code ('the PC') against Muhammad Khairuanuar bin Baharuddin ('the respondent') for murdering a child aged two years and two months old, Hanis Amanda bt
H Mohd Zafil ('the deceased'). The alleged offence occurred on 6 November 2015 at house No F-03, Lojing Heights 1, Jalan 1/27C, Seksyen 5, Wangsa Maju, in Wilayah Persekutuan Kuala Lumpur.

[2] The respondent was convicted by the High Court of the murder charge
I and was sentenced to death. However, on appeal to the Court of Appeal, the conviction under s 302 of the PC was substituted with a conviction of culpable homicide not amounting to murder under s 304(b) of the same Code. The respondent was then sentenced to ten years imprisonment from the date of arrest on 9 January 2018.

[3] Aggrieved with the decision of the Court of Appeal, the public prosecutor ('the appellant') appealed to this court against the substitution of the conviction from a conviction for an offence under s 302 of the PC to an offence under s 304(b) of the Code. The respondent also appealed against the Court of Appeal's decision for an acquittal and discharge of the said charge against the respondent.

THE CASE FOR THE PROSECUTION

[4] The prosecution in this case, like in many other murder cases, relied on circumstantial evidence to establish its case beyond a reasonable doubt. The circumstantial evidence adduced and relied upon by the prosecution can be summarised as follows.

[5] The deceased, Hanis Amanda bt Mohd Zafil, was born on 13 August 2013 and at the age of two years and two months, at the material time of the unfortunate incident. She was the daughter of Farah Adiba bt Md Othman ('PW7') and Mohd Zafil bin Ibrahim ('PW1') who were married in 2011 but were divorced in August 2014. They have another daughter named Fatin Hanisa who was born in 2011. On 6 May 2015, PW7 married the respondent. PW1 married Tengku Aishah bt Tengku Nong Idris ('PW2') after his divorce from PW7.

[6] The marriage of PW7 and the respondent faced difficulties as PW7 was the respondent's second wife and did not stay together. PW7 also later found out that the respondent has other wives and his first wife Fatin, stayed with the respondent at his house in Lojing Heights 1, Wangsa Maju, Kuala Lumpur. PW7 on the other hand, stayed at his father's house in Wangsa Melawati, Kuala Lumpur.

[7] Every day before going to work, PW7 worked as a sales agent with Perodua, sends the deceased and Fatin Hanisa to a babysitter's house near her father's house. However, in October 2015, the respondent insisted that the deceased be sent to him for him to take care of her, to which PW7 acceded. PW7 then noticed that whenever she sent the deceased to the respondent's house, she would scream and cry.

[8] The deceased father, PW1, once a while will look after the deceased, and from 17–19 October 2015, the deceased was sent to PW1's house by PW7. Whilst the deceased was in PW1 and PW2's custody, they noticed that there were bruises on the deceased body including on the ribs and the thighs. The deceased also told them that it was painful and the respondent did it to her (*akit … akit, Papa Bi buat*). When PW2 inquired from PW7 about the bruises on the deceased, PW7 responded that she was not aware of the injury as at that time

A the deceased was taken care of by the respondent.

[9] On 5 November 2015, the respondent, together with his driver, Muhammad Rizal bin Ghazali ('PW8') known as 'Jan', Roslan bin Idris ('PW10'), and Mohd Alif Haikal ('PW11') went to Terengganu as the
B respondent wanted to expand his farming business. They went in a car driven by PW8 and the respondent also took the deceased with him.

[10] On 6 November 2015, all of them went back to the respondent's house
C at No F-03, Lojing Heights 1, Jalan 1/27C, Seksyen 5, Wangsa Maju, Kuala Lumpur where they reached there at about 6.45am. Upon the arrival at the house, the respondent carried the deceased into the master bedroom upstairs, whilst PW8, PW10, and PW11 slept in the living room downstairs.

D **[11]** Around 8am, PW10 and PW11 returned to their hometown in Perak whilst PW8 was still sleeping on the sofa in the living hall. At about 3pm, PW8 awoke and heard the deceased screaming but went back to sleep. He later woke up at about 5.20pm when he felt water dripping on his face from the ceiling. He then placed a bucket under the dripping water and went up to the master
E bedroom to inform the respondent about the leaking. He knocked on the door room about five times before the respondent opened the door. He then saw the accused dressed only in shorts and the deceased was at the edge of the bed in a slightly bent position looking at him.

F **[12]** After informing the respondent about the water leakage, PW8 was instructed by the respondent to inform the Management Office, which was about 50 meters from the house, which PW8 did. The respondent at that time was in the house with the deceased and no one else. After returning from the
G management office, PW8 proceeded to clean and dry the floor of the living hall due to the water leakage. He then saw the respondent talking to one of the neighbours, Azihan bin Hussain ('PW9'). PW8 confirmed that the respondent did not leave the house at the material time as both the respondent's car was in the porch of the house.

H **[13]** Thereafter, when PW8 was in the kitchen, the respondent called him out anxiously from upstairs, and when he reached upstairs, he saw the deceased lying on the floor in front of the television with her face and lips bluish. The respondent was seen standing about one and a half meters from the deceased.
I PW8 then asked the respondent to take the deceased to the hospital and the respondent instructed PW8 to carry the deceased to the car which the respondent himself drove to Idzham Clinic at Taman Melawati. Upon reaching the clinic, the respondent carried the deceased through the back door. The door was closed and was open after the respondent banged on the door several times.

[14] Doctor Mohd Idzham bin Ibrahim ('PW3') who examined the deceased confirmed that the deceased had passed away upon arrival at the clinic and informed the respondent of this fact. The respondent then requested PW3 to issue a death certificate to enable the respondent to bury the deceased. The request was turned down by PW3 who asked the respondent to take the deceased to the hospital for a post mortem to be carried out. PW3 also suspected a child abuse case as he noticed some injuries on the deceased forehead and legs. The respondent then informed PW3 that he was a policeman and insisted that PW3 issued the death certificate. PW3 refused to accede to the respondent's request and responded that as a policeman, the respondent should have known the procedure.

[15] The deceased was then brought to the Forensic Department, Kuala Lumpur Hospital where a post mortem on the deceased body was carried out by Dr Ahmad Hafizam bin Hasmi ('PW12') on 7 November 2015 at 3.10pm. PW7 testified that before the post mortem was carried out, the respondent informed Dr Fatin, one of the doctors at the Forensic Department HKL, that the post mortem should only be conducted on the deceased chest and no other parts of the body. However, the respondent was informed that the post mortem would be carried out on all parts of the deceased body.

[16] PW12 then discovered 29 external injuries on the deceased body as listed in the post mortem report which are as follows:

1. Lebam warna kemerahan, 2.0 x 2.0 pada bahagian parietal kiri atas;
2. Lebam warna kemerahan, 2.2 x 2.0 pada bahagian tengah atas belakang kepala (upper occipital);
3. Lebam warna merah kebiruan, 6.0 x 4.0 sm dengan sebahagian menunjukkan kesan 'tramline' 3.5 sm panjang dan 1.0 sm lebar pada bahagian kanan kepala (temporo-parietal);
4. Calar keruping, 0.4 x 0.1 sm, 0.5 sm pada dahi kiri;
5. Parut, 0.7 x 0.3 sm pada hujung luar kening kanan;
6. Calar, 0.6 x 0.1 sm pada kanan batang hidung (nasal bridge);
7. Parut, 3.5 x 0.2 sm pada subcostal kiri;
8. 2 kesan calar post mortem, 0.3 x 0.3 dan 0.2 x 0.1 sm pada bahagian abdomen kanan;
9. Parut, 2.5 x 2.0 sm pada sisi kiri dada;
10. 2 lebam bentuk bulat, 1.6 sm diameter setiap satu, warna kemerahan belakang tengah kiri badan, 16.0 sm di bawah garis bahu;
11. Calar (abrasi), 1.6 x 1.5 sm pada bahagian sakral. Bahagian kiri calar ini masih kemerahan;

12. Lebam kebiruan, 0.9 x 0.8 sm pada hadapan dalam 1/3 atas paha kanan;
13. Lebam, 0.9 x 0.8 sm pada hadapan 1/3 paha kanan;
14. Parut-parut lama kawasan seluas 3.0 x 3.0 sm hadapan lutut kanan;
15. Lebam merah kebiruan, 1.0 x 1.0 sm pada sisi luar lutut kanan;
16. 3 x lebam warna merah kebiruan pada sisi luar 1/3 bawah paha kiri kawasan seluas 3.0 x 3.0 sm saiz ikut urutan atas ke bawah, 1.0 x 1.0, 0.9 x 1.0, 0.5 x 0.5 sm;
17. Parut, 1.5 x 0.2 sm pada 1/3 atas hadapan paha kiri;
18. 2 lebam kemerahan, 1.2 x 1.0 sm dan 1.0 x 1.0 sm pada hadapan tengah 1/3 atas keting kanan;
19. Lebam kemerahan, 1.0 x 1.0 sm hadapan dalam 1/3 tengah keting kanan;
20. Lebam kemerahan, 0.9 x 1.0 sm hadapan dalam 1/3 bawah keting kanan;
21. Parut-parut lama kawasan seluas 3.0 x 2.5 sm hadapan lutut kiri;
22. Lebam kemerahan, 1.5 x 1.0 sm hadapan luar 1/3 bawah keting kiri;
23. Parut, 1.6 x 0.2 sm pada sisi luar belakang 1/3 atas betis kiri;
24. 2 calar garis dengan keruping di bawah no. 23;
25. Lebam warna kemerahan, 1.4 x 1.3 sm sisi luar lutut kiri;
26. Lebam kemerahan, 1.1 x 1.0 sm pada belakang luar 1/3 bawah lengan atas kiri;
27. Lebam kemerahan, 1.3 x 1.1 sm di bawah no. 26;
28. Parut, 1.5 x 0.2 sm ½ belakang lengan bawah kiri; dan
29. Parut pada anus pada kedudukan pukul 5 dan pukul 7 urutan jam.

[17] As to the internal injuries of the deceased's head, PW12 found as follows:

> Kepala
>
> Pemeriksaan dalam kulit kepala terdapat pendarahan subgaleal warna merah gelap yang menyeluruh, 15.0 x 14.0 sm meliputi kawasan temporo-parietal kiri hingga ke occipital kanan. Otot temporalis kiri lebam manakala otot temporalis kanan utuh dan tidak cedera.
>
> Tengkorak retak pada bahagian kanan tulang occipital menjalar ke dasar tengkorak posterior kanan sepanjang 14.0 sm.
>
> Pendarahan di luar selaput otak sekitar retak tulang occipital dan pendarahan bawah selaput otak (subdural haemorrhage) dilihat pada bahagian atas tengah otak, dasar tengkorak tengah kanan dan kiri serta dasar tengkorak posterior.
>
> Otak yang diperiksa bengkak (1600.0 gram) dan lembik. Gyri otak rata dan sulci

otak menyempit. Pendarahan bawah selaput otak (subarahnoid haemorrhage) dikesan pada bahagian temporo-parietal kanan. Keratan rentas otak menunjukkan pendarahan di dalam ventrikel otak. Tiada sebarang penyakit dikesan. Salur darah Willis utuh.

[18] Further, in the post mortem report, PW12 states the following summary and conclusion:

1. Mayat telah dikenalpasti secara positif oleh Pegawai Penyiasat Polis dan bapa kandung simati;

2. Pemeriksaan bedah siasat yang dijalankan pada 07.11.2015 jam 03.10 petang di Jabatan Perubatan Forensik HKL;

3. Pemeriksaan bedahsiasat menunjukkan terdapat kesan trauma benda tumpul pada kepala simati yang menyebabkan retak tulang tengkorak, pendarahan di bawah selaput otak dan bengkak otak seterusnya membawa kepada kematian simati;

4. Trauma benda tumpul pada kepala ini boleh disebabkan oleh pukulan menggunakan objek tumpul dan keras atau kepala simati terhempas pada permukaan yang keras;

5. Cedera pada kepala simati ini tidak berpadanan dengan cedera akibat jatuh sendiri kerana lebam-lebam yang dikesan pada bahagian occipital atas dan bahagian parietal kiri atas bukan kawasan yang biasanya cedera akibat jatuh;

6. Lebam-lebam pada kepala dan pendarahan bawah selaput otak yang dilihat semasa bedahsiasat adalah cedera baru and berusia kurang dari 3 hari; dan

7. Tiada terdapat sebarang tanda penyakit fizikal ditemui yang dilihat boleh menyebabkan atau menyumbang kepada kematiannya.

[19] PW12 further concluded that the cause of the deceased's death was severe head injury due to blunt force trauma.

[20] PW7 also testified that after the post mortem report by PW12 was read by the respondent, he asked PW7 to request her friend, Dr Azian Liana to change the result of the post mortem report. However, PW7 did not accede to his request.

AT THE HIGH COURT

[21] The trial judge, having considered the evidence adduced by the prosecution at the close of the prosecution case, found that the prosecution had succeeded in proving a prima facie case for the offence of murder under s 302 of the Penal Code against the respondent as charged.

[22] In the grounds of judgment, the trial judge found that the prosecution

had proved all the elements of the offence of murder, which are the death of the deceased, the deceased had died as a result of injuries sustained by her, and the respondent caused the injuries. The trial judge also accepted the theory of 'last seen together' where the deceased was last seen with the respondent before her death. The trial judge also held that s 300(c) of the Penal Code is applicable and had been proven by the prosecution. The injuries in the present case were caused by the respondent which is sufficient in the ordinary cause of nature to cause death. Hence, the trial judge ordered the respondent to enter his defence.

[23] The respondent, in his defence under oath, essentially denied murdering the deceased. He asserted that several persons had the opportunity to commit the offence including his driver, PW8. The respondent also presented a notice of alibi to show that he was not at the place of the incident at the material time. The respondent also denied that he had requested Dr Mohd Idzham (PW3) to issue a death certificate for the deceased or informed PW3 that he was a policeman.

[24] After having analysed the defence case including the alibi defence and the evidence in totality, the trial judge found that the defence had failed to raise any reasonable doubt on the prosecution case. Therefore, the respondent was convicted of the offence of murder under s 302 of the Penal Code and was sentenced to death.

AT THE COURT OF APPEAL

[25] Aggrieved with the decision of the trial judge, the respondent filed an appeal to the Court of Appeal against the said decision. After perusing the evidence and hearing the submissions by parties, the Court of Appeal held that the evidence does not support the offence of murder under s 302 but only established an offence of culpable homicide not amounting to murder. As such the conviction of the offence of murder against the respondent under s 302 of the Penal Code was substituted with the conviction of the offence of culpable homicide not amounting to murder under s 304(b) of the same Code.

[26] Although the Court of Appeal agreed with the trial judge that the principle of 'last seen together' was applicable in the present case, the evidence presented is insufficient to establish the murder offence. Further, there was no evidence of premeditation or pre-existing malice against the deceased.

[27] The Court of Appeal was of the view that neither s 300(c) nor (d) had been fulfilled by the prosecution. The prosecution had failed to prove that the respondent had the intention to inflict the injuries on the deceased or that the respondent had any knowledge that the injury inflicted was imminently

dangerous and that it must in all probability cause death or likely to cause death.

[28] The reasoning of the Court of Appeal in substituting the conviction of murder for one of culpable homicide can be found in paras 91 and 92 of the grounds of judgment which are as follows:

> [91] We are not with the learned High Court judge in his finding that the facts and circumstances raised strong inference that the accused had intention of inflicting bodily injury to the deceased and the bodily injury inflicted was sufficient in the ordinary course of nature to cause death pursuant to limb (c) to s 300 of the Penal Code. We find that the prosecution failed to prove the element of intention in this case. Nothing in the facts suggested that the accused had an intention to inflict the injury to the deceased. Thus, the question arose as to whether the accused's act fell within limb (d) which only require that the accused knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death.
>
> [92] After careful consideration, we find that in this case, the special degrees of mens rea referred to in s 300(d) is not satisfied. We are of the view that the evidence by the prosecution is lacking in proving that the accused acquired knowledge that his act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death. We have taken this from the fact that PW8 heard the child scream at around 3pm. PW8 also testified that the deceased was alive at about 5.20pm. PW8 also saw the deceased lying down holding a milk bottle in front of the television after that. Therefore, our inference from this evidence of PW8 is that the accused is lack of knowledge that the injury inflicted on the deceased is imminently dangerous that it must in all probability cause death or likely to cause death. In *Ratanlal & Dhirajlal* at p 1302, if the case cannot be placed as high as that and the act is only likely to cause death and there is no special knowledge, the offence comes under second part of s 304 of the Indian Penal Code.

THE APPEAL

[29] There are four main issues submitted orally and in writing by parties in this appeal which are as follows:

(a) whether the evidence presented by the prosecution had established that the respondent had the intention to inflict the injuries on the deceased;

(b) whether the injuries intentionally inflicted by the respondent are sufficient in the ordinary course of nature to cause death which attracts the application of s 300(c) of the Penal Code;

(c) whether the prosecution needs to establish pre-meditation and pre-existing malice by the respondent before a murder offence can be established; and

(d) the respondent's notice of alibi.

Whether the evidence presented by the prosecution had established that the respondent had the intention to inflict the injuries on the deceased

[30] Before we proceed to address this issue, it is pertinent to reiterate the settled principle of law that to attract the application of s 300(c) of the Penal Code, the prosecution must prove the presence of bodily injury, the accused intentionally inflicted the injury and that the injury is sufficient in the ordinary course of nature to cause death.

(See: *Public Prosecutor v Sanderasegaran a/l Nithenanham* [2024] 3 MLJ 629; [2024] 4 CLJ 823 (FC); *Zulkiple bin Mohamad v Public Prosecutor* [2022] 1 MLJ 479; [2022] 1 CLJ 673 (FC); *Mickelson Gerald Wayne v Public Prosecutor* [2022] 6 MLJ 118 (FC); *Mohamed Yasin bin Hussin v Public Prosecutor* [1976] 1 MLJ 156 (PC); *Virsa Singh v State of Punjab* (1958) 1 MLJ (Crl) 579; *Tan Cheow Bock v Public Prosecutor* [1991] 3 MLJ 404; *Public Prosecutor v Visuvananthan* [1978] 1 MLJ 159.)

[31] In the present case, the Court of Appeal held that the prosecution had failed to prove that the respondent had intentionally inflicted the injuries on the deceased. Thus, one of the elements that attracts the application of s 300(c) has not been proven.

[32] To begin with, an intention is a question of fact that cannot be proved by direct evidence. Inference from the evidence presented and the surrounding circumstances has to be made to determine this fact. This too is stated lucidly by Thompson J in *Chan Pean Leong v Public Prosecutor* [1956] MLJ 237 in the following words:

> *Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances*. Whether these surrounding circumstances make out such intention is a question of fact in each individual case. (Emphasis added.)

[33] In Ratanlal & Dhirajlal, *The Indian Penal Code* (32nd Ed) on p 1274, the issue of intention in a murder case was discussed and explained as follows:

> *Intention how to be deduced — The intention is a question of fact which is to be gathered from the acts of the parties*. The law books as regards intention to the natural result of a man's act, and not to the condition of his mind. So, when a normal man does an act, he should be credited with the intention of doing that which is inevitable consequence of his act. Further, *the nature of intention has to be gathered from various circumstances*, for instance, the kind of weapon used, *the part of the body hit, the amount of force employed* and the circumstances attending upon death. *In the absence of any indication or circumstances to show that the particular injury inflicted by the accused was accidental or unintentional or that some other kind of injury was intended to be inflicted, the presumption would be that the very injury suffered by the deceased was intended. Mere absence of premeditation will not be enough to displace this*

presumption. The question whether the offender entertained a particular type of intention or not is the question which is to be answered not from any direct evidence but from the proved facts and circumstances of the case. However, it should be borne in mind that intention with which an act should be found to have been committed is neither constructive nor presumptive in its character. Though it is true that the court should not expect direct evidence of intention in every case and that a proper inference about existence of a particular intention can be made from the circumstances of the case, such circumstances should be such as would enable the court to arrive at a conclusion beyond reasonable doubt that the intention in question did exist. Evidence of motive is generally found to be capable of supplying good evidence about the nature of the intention to commit the particular act. *The facts collateral to the main incident such as the manner and the method by which the offence was executed, possibility of the successful execution of the intended act, care taken by the accused to eliminate the possible mistakes in carrying out the successful execution of the intended act are some of the facts which are likely to throw good light upon the actual intention with which the act was done*. (Emphasis added.)

[34] Reverting to the present case, the established facts by the prosecution which are relevant for consideration are the following:

(a) the respondent insisted on taking care of the deceased and at the time of the deceased's death, the deceased was under the respondent's custody and care;

(b) the deceased informed PW1 and PW2 that the respondent inflicted the injuries when PW1 and PW2 noticed the injuries on the deceased ribs and thigh (*akit, akit, Papa Bi buat*);

(c) on 6 November 2015, the day of the deceased's death, at about 3pm, PW8 heard the deceased scream from upstairs of the house. The evidence of PW8 was accepted by both the High Court and the Court of Appeal. The Court of Appeal in its grounds of judgment stated as follows:

> [93] On the other issues raised by the defence counsel, we agreed with the finding of the learned High Court judge. It is worth to note that even though the defence argued on the point that there are two persons in a place where an alleged offence is said to have been committed (ie the accused and PW8) and the defence suggestion that it was PW8 who had killed the deceased. *However, in our view, PW8's evidence is clearly admissible*. PW8's evidence was neither self-exculpatory nor accusing the accused. His evidences were only as to what within his knowledge and nothing in the record stated that PW8 was shaken when he was cross-examined. In this regard, we have to remind ourselves that a trier of fact, the learned High Court judge had the audio-visual advantage reserved to a trial judge.
>
> [94] In the circumstances, the learned High Court judge had correctly examined the evidence adduced before him and also correctly applied the principles when assessing circumstantial evidence. *Therefore, we do not disturb*

the finding of the learned High Court judge who relied on the evidence of PW8 since PW8 was held to be a reliable witness. (Emphasis added.)

(d) the respondent was last seen with the deceased when the deceased was still alive. At about 5pm, 6 November 2015, PW8 knocked on the door of the master bedroom to inform him of the water leakage in the living room. The respondent opened the door and PW8 saw the deceased at the edge of the bed in a slightly bent position and looking at him;

(e) PW8 also confirmed that the respondent did not leave the house that day as two of his cars were in the porch of the house;

(f) after that, PW8 heard the respondent shout his name when he was in the kitchen, and when he went upstairs, he saw the deceased lying in front of the television with her face and lips bluish. The respondent was standing about 1.5 meters from the deceased;

(g) the respondent brought the deceased to Dr Idzham's clinic through its back door;

(h) the respondent insisted Dr Idzham (PW3) to issue the death certificate of the deceased and when the request was denied, the respondent identified himself as a policeman;

(i) at the Forensic Department HKL, the respondent requested the post mortem to be done only on her chest and no other parts of the body;

(j) the result of the post mortem report by PW12 found 29 external injuries on the deceased body and the cause of death was severe head injury due to blunt force trauma;

(k) PW12 also found that the head injuries suffered by the deceased were not accidental; and

(l) the respondent requested PW7 to ask her friend, Dr Azian Liana, to change the post mortem result.

[35] In this regard, firstly, the respondent had the opportunity to inflict injuries on the deceased. The respondent was the last person seen with the deceased while the deceased was still alive and importantly, the respondent's conduct after the deceased death showed the act of covering the offence committed. The respondent brought the deceased to Dr Idzham through the back door of the clinic, requesting Dr Idzham to issue the death certificate, introduced himself as a policeman, requested the post mortem to be carried out only on the chest of the deceased, asking PW7 to change the post mortem result and the 29 injuries, particularly on the deceased head, which was not accidental speaks volumes that the respondent had the intention to inflict the injuries on the deceased. The inference from the surrounding circumstances, including the fact that the deceased had informed PW1 and PW2 that it was

the respondent who caused the bruises on her legs and thighs, shows that the respondent had the intention to inflict the injuries on the deceased.

[36] The trial judge had also made a finding of fact that it was the respondent who intentionally inflicted the fatal injuries on the deceased, with which we agree based on the above-mentioned reasons and the appellate court should slow in disturbing the finding of fact of the trial judge who had the audio-video advantage (see *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151; [2009] 3 CLJ 236 (FC); *Lee Ah Seng & Anor v Public Prosecutor* [2007] 6 MLJ 1; [2007] 5 CLJ 1).

Whether the injuries intentionally inflicted by the respondent are sufficient in the ordinary course of nature to cause death which attracts the application of s 300(c) of the Penal Code

[37] The next issue is whether the injuries inflicted by the respondent on the deceased are sufficient in the ordinary course of nature to cause death. The injury that caused the deceased death was the injury to the head. This injury was found by PW12 due to blunt force trauma and it was not accidental.

[38] Here, whether the injury inflicted is sufficient in the ordinary course of nature to cause death is a question of fact to be determined by the court. An objective assessment of the evidence, particularly the medical or forensic evidence needs to be carried out by the court. The same issue was addressed by this court in *Zulkiple bin Mohamad v Public Prosecutor* [2022] 1 MLJ 479; [2022] 1 CLJ 673 where this was said:

> [15] *Whether the injury is sufficient in the ordinary course of nature to cause death is essentially a question of fact for the court to determine*. Since however, this is a matter that is in the realm of medical science, *medical evidence is needed to assist the court in arriving at a decision*. Obviously, it is not for any layperson without the proper medical training and background to determine as a matter of scientific fact whether a particular injury is sufficient in the ordinary course of nature to cause death.
>
> ...
>
> [20] *The crucial part of SP13's evidence was that the injuries on the deceased's head could cause direct or almost immediate fatality*, ie, death ('Kecederaan-kecederaan tersebut boleh secara terus atau sehampir secepat menyebabkan kematian'). He testified that the deceased would not be able to survive the injuries.
>
> [21] *This effectively means that the injuries were of a kind that is 'sufficient in the ordinary course of nature to cause death' within the meaning of cl (c) of s 300 of the Penal Code* although SP13 did not describe the injuries in those exact terms either in his post mortem examination or in his oral evidence in court. At the trial, SP13 was shown the baseball bat (P10A) that the police seized from the scene of crime and he confirmed that it could cause injuries 1, 2, and 3 found on the deceased's head.
>
> (See also *Public Prosecutor v Sanderasegaran Nithenanham* (FC); *Mickelson Gerald*

Wayne v Public Prosecutor (FC).) (Emphasis added.)

[39] In the present case, PW12 in his post mortem report stated that the blunt force trauma on the deceased head resulted in the fracture of the skull, bleeding of the underlayer of the brain, and swollen brain had caused the deceased death. This was stated in PW12's report as follows:

> 3. Pemeriksaan bedahsiasat menunjukkan terdapat kesan trauma benda tumpul pada kepala simati yang menyebabkan retak tulang tengkorak, pendarahan di bawah selaput otak dan bengkak otak seterusnya membawa kepada kematian simati.

[40] In his oral testimony, PW12 explained that the injury to the head of the deceased was very serious, especially to a child, which resulted in her death. The following evidence by PW12 is crucial:

> Ya, YA. Faktor yang seterusnya yang menyebabkan pada pendapat saya ia bukanlah disebabkan jatuh, selalunya kecederaan akibat jatuh ini selalunya solitary ataupun satu. Tapi *dalam kes ini ada 4 tempat yang cedera dan impact yang paling kuat itu seperti yang telah saya jelaskan tadi adalah pada bahagian belakang kepala. Cedera pada kepala yang saya periksa itu memang cukup parah kerana ia menyebabkan retak tulang tengkorak, pendarahan di bawah selaput otak, bengkak otak yang memang boleh menyebabkan kematian*.
>
> ...
>
> YA berdasarkan kecederaan yang ada, *kecederaan ini adalah kecederaan yang parah*. Yang pertama jika berlaku kecederaan ini, kanak kanak itu, yang pertama, boleh sahaja tidak sedarkan diri terus atau kanak-kanak itu boleh merasa sangat sakit dan kemudiannya mendapat sawan. Boleh juga kanak-kanak ini menangis oleh sebab kesakitan dan muntah. Ia pelbagai.
>
> ... *Yang saya boleh buktikan melalui bedahsiasat bahawa berlakunya kecederaan parah pada kepala dan saya sahkan itulah punca kematiannya. Kecederaan kepala ini boleh mengakibatkan tidak sedarkan diri dan mati* ataupun boleh juga menyebabkan sawan dulu dan mati ataupun kalau kecederaan tidak parah dan boleh menyebabkan sakit kepala, muntah dan kabur mata. (Emphasis added.)

[41] Further, the deceased was still alive at about 5pm on 6 November 2015 as testified by PW8 but was found dead a few hours later at about 7.45pm when the deceased was brought to Dr Idzham Clinic as testified by PW3 in his testimony.

[42] The cumulative evidence above mentioned, especially the medical evidence, we find, that the injury on the deceased's head was a kind that is sufficient in the course of nature to cause death. This is despite the pathologist, PW12, not mentioning specifically in his testimony that the injury on the deceased's head is sufficient in the ordinary course of nature to cause death. The total effect of PW12 evidence comes to the said conclusion. In the result,

s 300(c) had been established by the prosecution for the offence of murder against the respondent. A

(See *Zulkiple Mohammad v Public Prosecutor*; *Public Prosecutor v Sandarasegaran Nithenanham*.)

B

[43] The trial judge also made his finding, with which we agree, that the injury inflicted was sufficient in the ordinary course of nature to cause death. However, the Court of Appeal did not touch on this issue since it was the Court of Appeal's decision that the prosecution had failed to establish that the respondent had the intention to inflict injury on the deceased. C

Whether the prosecution needs to establish pre-meditation and pre-existing malice by the respondent before a murder offence can be established

[44] On this issue, one of the reasons the Court of Appeal substituted the conviction from the offence of murder to culpable homicide not amounting to murder under s 304(b) was that the prosecution had failed to adduce any evidence of premeditation or pre-existing malice on the respondent towards the deceased. In its grounds of judgment, this was said: D

> [85] We agreed with the learned High Court judge on the application of the 'last seen together principle'. However, only to a conviction for the lesser offence of culpable homicide not amounting to murder under s 304(b) of the Penal Code was justified considering the weight of evidence tendered by the prosecution. *There was certainly no evidence of any premeditation or pre-existing malice on the accused towards the deceased*. (Emphasis added.) E F

[45] In this regard, we find the reason given by the Court of Appeal to substitute the conviction of murder with culpable homicide not amounting to murder is flawed for the simple reason that premeditation or pre-existing malice are not the elements of an offence of murder under s 302 of the Penal Code. Failing to establish premeditation or pre-existing malice by the prosecution, does not justify a substitution of the conviction of murder. G

[46] It is settled law that for the prosecution to establish an offence of murder punishable under s 302 of the Penal Code, the elements to be proved by the prosecution are, the death of the deceased, the deceased died as a result of the injuries suffered, the injuries were caused by the accused, and the accused's act comes within one or a combination of the limbs under s 300 of the Penal Code. The act under any one or combination of the limbs under s 300 establishes the offence of murder. In the present case, the applicable limb is s 300(c) of the Penal Code. H I

[47] We noted that Exception 2 and Exception 4 to s 300 of the Penal Code state to the effect that the absence of premeditation may result in the act being

only culpable homicide not amounting to murder. However, Exception 2 applies when exercising the rights of private defence where it states as follows:

> Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given by him by law, and causes the death of the person against whom he is exercising such right of defence, *without premeditation* and without any intention of doing more harm than is necessary for the purpose of such defence. (Emphasis added.)

[48] Next, Exception 4 only applies in a sudden fight case, occurs in the heat of passion and the accused had not taken unfair advantage or acted cruelly or unusually. Exception 4 is as follows:

> Culpable homicide is not murder if it is committed *without premeditation* in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner. (Emphasis added.)

[49] Exception 2 and Exception 4 above-mentioned, clearly do not apply to the factual matrix of the present case. The respondent was not relying on any of the exceptions to s 300 of the Penal Code. Hence, the absence of premeditation or malice in the present case will not reduce the offence of murder under s 302 of the Penal Code to the offence of culpable homicide not amounting to murder under s 304 of the same Code.

The respondent's notice of alibi

[50] The defence of alibi and its procedures are provided for under s 402A of the Criminal Procedure Code. The alibi defence essentially is that the accused was somewhere else other than at the time and place of the offence committed. In a landmark case on alibi, this court in *Ku Lip See v Public Prosecutor* [1982] 1 MLJ 194 Abdul Hamid FJ explained the issue of alibi in the following manner:

> A determination whether particular evidence is evidence in support of alibi entails a consideration *whether the evidence shows or tends to show that by reason of the presence of the accused at some particular place or area at a particular time he cannot be or is unlikely to be at the place where the offence is committed*. It is difficult if not impossible to envisage with reference to a particular charge what evidence amounts or does not amount to evidence in support of a defence of alibi. It depends very much on the facts of each particular case. It has been described that 'What is ordinarily meant by an alibi is that the accused's presence elsewhere is essentially inconsistent with his presence at the time and place alleged, and therefore with participation in the crime. An alibi may absolutely preclude the possibility of presence at the alleged time and place of the act, or the alibi may not involve absolute impossibility, but only high improbability and yet be convincing' (see *Criminal Law Review 1978* pp 277–8 and also on p 278 where it is further stated that 'a true alibi defence consists of an affirmative proof of the defendant's presence

somewhere other than at the time and place alleged'). (Emphasis added.)

[51] The burden cast upon the accused to establish the defence of alibi is to raise a reasonable doubt only (see *Illian & Anor v Public Prosecutor* [1988] 1 MLJ 421 (SC)).

[52] In the respondent's notice of alibi, the facts stated therein are as follows:

(i) Pada 6.11.2015, Mohd Rizal bin Ghazali ('Jan') telah masuk mengetuk 2.30 petang hingga 3.00 petang, Jan telah mengetuk pintu bilik OKT mengatakan bahawa terdapat air bocor dari tangki. Mangsa baru bangun tidur dan lalu meminta OKT untuk memasang televisyen untuk beliau tengok kartun;

(ii) Pukul 3.30 petang, OKT berada di luar rumah bersama Jan untuk mendapatkan nombor telefon tukang paip dan mangsa ketika itu berada di ruang menonton TV di bahagian atas rumah;

(iii) Antara pukul 3.30 petang dan 3.40 petang, Encik Tan, iaitu tuan rumah sewa kepada rumah OKT telah memberi nombor telefon tukang paip tersebut bagi melakukan pembaikan. OKT dan Jan masuk ke dalam rumah selepas menelefon tukang paip untuk membersihkan tempat bocor di ruang tamu;

(iv) Pada pukul 3.40 petang, OKT telah keluar seorangan untuk membeli mop dan beberapa peralatan lain di AEON Big berdekatan rumah beliau bagi tujuan membersihkan tempat bocor itu sendiri, kerana takut tukang paip akan lewat datang. Namun, sebelum beliau sempat beli peralatan tersebut, OKT menerima panggilan telefon mengatakan tukang paip sudah siap kerja. OKT membuat pusingan u-turn dan terus pulang rumah.

(v) Pada pukul 4.00 petang OKT terus masuk ke rumah dan melihat tiada lagi kebocoran. Kemudian, OKT mendapati mangsa kekejangan di ruang menonton TV dan memanggil Jan membantu untuk memeriksa mangsa dan seterusnya membawa mangsa ke Klinik Idzham.

[53] First and foremost, the charge against the respondent was that the respondent murdered the deceased at his house No F-03, Lojing Heights 1, Jalan 1/27C, Seksyen 5, Wangsa Maju on *6 November 2015 between 7.30am to 7.30pm*. The facts stated in the notice of alibi do not exclude that the respondent was at the place and time specified in the charge. The respondent had the opportunity to commit the murder and was not somewhere else at the material time. The respondent's presence at the place and time of the offence committed was positively identified by PW8 which was found to be a credible witness by the High Court and the Court of Appeal. Thus, the respondent's defence of alibi is untenable as the respondent had failed to preclude him from the possibility of being at the place and time of the offence committed.

[54] On this issue of alibi, this court had explained extensively in the case of *Duis Akim & Ors v Public Prosecutor* [2014] 1 MLJ 49; [2013] 9 CLJ 692 as follows:

> *[92] Now, the following legal principles on the defence of alibi are relevant in the present namely:*
>
> (a) '*the defence of alibi must preclude the possibility that the accused could have been physically present at the place of the crime or its vicinity at or about the time of its commission*' (see: *Regina v Youssef* (1990) 50 A Crim R1 at pp 2–3);
>
> (b) the correct 'approach to be adopted in regard to an alibi defence, ... is to *consider the alibi in the light of the totality of the evidence and the court's impression of the witnesses*. If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable. The ultimate test, and there is only one test in a criminal case, is whether the evidence establishes the guilt of the accused beyond reasonable doubt' (see: *Leve v S (CA & R 163/12)* [2013] ZAECGHC 5 (31 January 2013) (South Africa)*;*
>
> (c) as such 'it would be wrong to reason that if the evidence of the state witnesses, considered in isolation, is credible the alibi must therefore be rejected. The correct approach is *to consider the alibi in the light of all the evidence in the case and the court's impressions of the witnesses and from that totality to decide whether the alibi might reasonably be true*' (see: *R v Hlongwane* 1959 (3) SA 337);
>
> (d) 'once the trial court accepted that the alibi evidence could not be rejected as false, it was not entitled to reject it on the basis that the prosecution had placed before it strong evidence linking the appellant to the offences. The acceptance of the prosecution's evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been, when considered in its totality, of the nature that proved the alibi evidence to be false' (see: *S v Liebenberg* 2005(2) SACR 355 (SCA);
>
> (e) 'it is trite that once an accused person pleads an alibi he does not assume the burden to prove it is true. The onus is on the prosecution to prove by evidence the alibi is false and to place the accused squarely at the scene of crime' (see: *Mutachi Stephen v Uganda*. The evidence of his alibi need only raise a reasonable doubt that he committed the crime (see: *R v Lizotte* 1950 CanLll 48 (SCC); [1951] SCR 115); and
>
> (f) the alibi of an accused does not have to be corroborated by independent evidence in order to raise a defence (see: *R v Letourneau* [1994] BCJ No 265 (QL) (CA), 61). (Emphasis added.)

[55] Applying the settled principle of law on an alibi defence and the reasons above-mentioned, we find the trial judge was right in rejecting the respondent's alibi.

[56] Further, the trial judge found material contradictions between the facts stated in the notice of alibi and the respondent's testimony in court, particularly regarding the time of certain events. Therefore, the respondent had failed to show affirmative proof that the respondent was elsewhere at the time and place of the offence committed.

CONCLUSION

[57] In the circumstances and based on the aforesaid reasons, the appellant's appeal is allowed and the decision of the Court of Appeal is set aside. The decision of the High Court is restored that the respondent's conviction for the offence of murder under s 302 of the Penal Code is safe and thereby affirmed. The appeal by the respondent for an acquittal of the charge is dismissed.

[58] As on the sentence, and having considered the new amendment of the Abolition of Mandatory Death Penalty Act 2023 and submission by parties, we find the murder of the deceased, a child at the age of two years and two months is an exceptional case that refrains us from exercising our discretion to order an imprisonment sentence under the new Act. As such, the death sentence is maintained.

Prosecution's appeal allowed, accused's appeal dismissed, Court of Appeal's decision set aside and High Court's decision restored.

Reported by Ashok Kumar